Consultation response

Consultation on the Professional Standards Authority's good practice guidance documents in support of regulatory reform

April 2024

1. **Please describe your organisation or role [member of the public/health or care statutory regulator/Accredited Register/other health or care body/patient representative body/registrant of a health or care statutory body/Accredited Register practitioner/professional association/other]**

   GOC response: The General Optical Council (GOC) is the regulator for the optical professions in the UK. We register optometrists, dispensing opticians, student optometrists and dispensing opticians, and optical businesses. We protect the public by setting standards for education, training, performance and conduct amongst opticians in the UK. We have four core functions:
   - Setting standards for the performance and conduct of our registrants.
   - Approving qualifications leading to registration.
   - Maintaining a register of individuals who are fit to practise or train as optometrists or dispensing opticians, and bodies corporate who are fit to carry on business as optometrists or dispensing opticians.
   - Investigating and acting where registrants' fitness to practise, train or carry on business may be impaired.

2. **Please give the name of your organisation, or your name if you are responding as an individual.**

   GOC response: General Optical Council (GOC)

3. **A summary of responses received to this consultation will be published in a consultation outcome report. Any comments you make may be included but will be anonymised unless you give us permission to use your/your organisation's name.**
   Are you happy for your name/your organisation's name to be included in any published reports?

   GOC response: Yes

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The use of accepted outcomes in fitness to practise: Guidance for regulators

4. **Do you think that our fitness to practise guidance will help regulators to make best use of accepted outcomes, and use them in a way that is fair, transparent and protects the public? [Free text box]**

   GOC response: We are supportive of the Department of Health and Social Care's (DHSC) plans to introduce the accepted outcomes process for regulators as a means of resolving cases in a swifter, less adversarial and cost-effective way. We also support the PSA's role in providing guidance to regulators, as part of its function of promoting the interests of users of health and social care as well as promoting best practice and co-operation between regulators.

   We agree that the guidance could be a useful aid for regulators when developing their own guidance in these areas to ensure that the accepted outcomes process is fair, transparent and promotes effective decision making. We have set out a number of comments below.

   - The consultation states that the guidance is aimed primarily at regulators but must also be easily understood by registrants and members of the public. In terms of transparency, we agree that it's important for the guidance to be accessible, and in this respect, we think that the guidance should be set out in a shorter, clearer framework outlining the high-level principles.
   - We would like greater clarity from the PSA on the status of the guidance. The consultation states that the guidance has no official status and is not binding on regulators, but then states that the PSA will use the guidance as a tool to assess whether regulators are meeting their standards under the performance review process.
   - How will the guidance sit alongside guidance from the regulator, and will this be confusing for stakeholders involved in the accepted outcomes process, such as complainants and registrants?

5. **Factor 1: 'Has the registrant failed to accept the findings and/or impairment?' Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome? [Yes/no/don't know]**

   GOC response: Yes

6. **Do you have any comments on this factor, or the bullet points listed in our guidance under this factor? [Free text box]**

   GOC response: We think this section is confusing as it would appear to be inconsistent with the requirements under the Anaesthesia and Associates and Physician Associates Order 2024 (AAPA Order) i.e. for a case to be *disposed* of at *case examiner* stage via the accepted outcomes route, the registrant *must* agree with three elements: they must accept their fitness to practise is impaired; they must accept the case examiner findings; and they must agree with the final measure (Part 4 section 10 (8) (4)). Therefore, if the registrant fails to accept the findings and / or impairment at the final stage, the case will automatically be referred onwards. We agree that there must be a very clear process for outlining concepts such as impairment to registrants and for obtaining agreement from the registrant on all three elements required.

   This section is also silent on non-responding registrants and the route to disposal or onwards referral. For completeness, we suggest the PSA guidance should include this.

7. **Factor 2: 'Is there a dispute of fact/conflict of evidence that can only be fairly tested at a hearing?' Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome? [Yes/no/don't know]**

   GOC response: Yes

8. **Do you have any comments on this factor, or the bullet points listed in the guidance under this factor? [Free text box]**

   GOC response: We agree that in cases where there is a dispute of fact / conflict of evidence case examiners should consider whether this is best explored at a hearing. It is important that cases are dealt with in an open and transparent way and in cases where there is a dispute, there is an opportunity to ask questions and cross examine registrants and witnesses.

   The factors outlined in paragraph 7.14 seem reasonable and we have no further comments.

9. **Factor 3: 'Does the complexity of the case suggest that a hearing may beneficial?' Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome? [Yes/no/don't know]**

GOC response: Yes

10. **Do you have any comments on this factor, or the bullet points listed in the guidance under this factor? [Free text box]**
    GOC response: We agree that case examiners are competent in dealing with complex cases without the need for onward referral. However, we also agree that some complex cases may lend themselves to being heard by the Fitness to Practise Panel, for example, complex clinical cases with several expert witnesses.

    The factor outlined in paragraph 7.16 seems reasonable and we have no further comments.

11. **Factor 4: 'Would it be beneficial and proportionate to test insight at a hearing?' Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome? [Yes/no/don't know]**

    GOC response: Yes

12. **Do you have any comments on this factor or the bullet points listed in the guidance under this factor? [Free text box]**

    GOC comments: We agree that demonstrating insight is a fundamental part of the fitness to practise process. Whether this is done on the papers, or at a hearing is dependent on the nature of the individual case. A factor in deciding whether a case should be dealt with by the accepted outcome route or panel hearing is whether the registrant is able to show insight and whether the format allows for that insight to be explored or examined. For example, in some cases involving dishonest behaviour, criminal activity or a poorly managed health concern, it may be best for the case to go to a panel hearing. This would more easily allow the registrant to demonstrate their insight and the panel to assess that insight, than could happen through the accepted outcome process.

    The factors outlined in paragraph 7.20 seem reasonable and we have no further comments.

13. **Factor 5: Lay representation in decision-making. Do you agree that regulators should continue to ensure lay representation at some point in the fitness to practise decision-making process? [Yes/no/don't know]**

    GOC response: Yes

We agree with the PSA that from a public protection and public confidence perspective, it is important that lay decision makers are part of the fitness to practise process, but how this is achieved should be at the discretion of the regulator. The GOC's current fitness to practise process includes both lay and professional decision makers i.e. at case examiner stage, cases are considered by one lay and one professional decision maker (a registered optometrist or dispensing optician).

14. **Factor 6: The use of single decision-makers. Do you agree that some fitness to practise cases may benefit from more than one decision-maker? [Yes/no/don't know]**

    GOC response: Yes

    As stated in our response to question 13, our current process involves one lay and one professional decision maker at the case examiner stage. We agree with the PSA that there are clear advantages in the approach we currently take (i.e. one lay and one professional), in terms of building public trust and confidence in the system. We also agree that arguably more than one decision maker increases the robustness of the process and reduces the risk of bias. However, as the AAPA Order allows for single or multiple decision makers, we are also mindful that it may be proportionate and appropriate in some cases to use single decision makers.

    In order to mitigate against the risk of bias, it is important for regulators to be aware of the risks and mitigations, for example, all decision makers should have appropriate training and the system should be underpinned by a robust quality assurance process i.e. case examiner decisions are monitored and audited regularly with any learning fed back into the system.

15. **Do you have any comments on the bullet points listed in the guidance relating to the composition of decision makers? (See paragraph 7.29) [Free text box]**

    GOC response: We think that any guidance issued must be consistent with the requirements under the AAPA Order and reflect the different models that can exist. In that respect, the first bullet point is suggesting a model of multiple decision makers, which doesn't reflect statutory requirements. (*"Is at least one case examiner a lay person? If not, is there lay involvement at some stage in the fitness to practise decision-making process?")*

    In relation to the other two factors, we think that any guidance produced must be framed in a way that doesn't undermine the skills

and proficiency case examiners are already expected to have in order to deal effectively with complex or ambiguous issues, large amounts of evidence, and cases where there may be cultural considerations.

16. **Factor 7: publishing case examiner decisions. Do you agree that the bullet points in the guidance under this factor are the right ones? [Yes/no/don't know]**

    GOC response: Yes

17. **Do you have any comments on the bullet points listed in the guidance under this factor? [Free text box]**

    GOC response: Transparency and openness are essential parts of the fitness to practise process. We agree that case examiner decisions need to be published in a place which is accessible to members of the public and set out in a way that does require any prior knowledge.

    Where cases are resolved by the accepted outcomes model, regulators will need to consider carefully the information they put in the public domain, not just about the outcome itself but about the process the regulator followed, and the evidence gathered. In this case, we believe that it is essential to publish the allegations, the acceptance of those allegations by the registrant and the outcome from the panel. This marks the seriousness of the concern and allows the public to understand how the regulator has dealt with the concern. It also allows for learning from the wider professions.

    The factors outlined in paragraph 12.15 seem reasonable and we have no further comments.

18. **Factor 8: Promoting a fair and effective accepted outcomes process. Do you agree that the bullet points listed under this factor in the guidance are the right ones? [Yes/no/don't know]**

    GOC response: Yes

19. **Do you have any comments on the bullet points listed in the guidance under this factor? [Free text box]**

    GOC response: We agree that it is important for regulators to promote a fair and effective accepted outcomes process, and we already ensure we promote concepts such as fairness, accountability and transparency as part of our wider fitness to practise function. We agree that all regulators need to be mindful of their obligations to protect and promote equality, diversity and inclusion, and be aware of any negative

impacts on those with protected characteristics. GOC case examiners already receive training so they are able to competently identify and deal with these types of issues. We also ensure that as part of our quality assurance system, any learning from audits is fed back into case examiner training.

We also recently undertook an Equality, Diversity and Inclusion (EDI) Review to understand how we can continue to improve in this space. Part of this will involve us looking at further actions to take in relation to identifying and addressing unfair outcomes in the fitness to practise process. Please refer to our March 2023 Council meeting for more information: Public Council Meeting 13 March 2024 - Meeting Papers.pdf

The factors outlined in paragraph 13.21 seem reasonable and we have no further comments.

20. **Please set out any impacts that the guidance would be likely to have on you and/or your organisation, or considerations that we should when assessing the impact of our proposals. [Free text box]**

GOC response: As we stated in question 4, we would like greater clarification on the status of the PSA's guidance particularly in relation a regulator's performance review before we are able to accurately assess its impact.

21. **Are there any aspects of our proposals that you feel could result in different treatment of, or impact on, groups or individuals based on the following characteristics as defined under the Equality Act 2010 [Yes/no/don't know]**

- **• Age**
- **• Disability**
- **• Gender reassignment**
- **• Marriage and civil partnership**
- **• Pregnancy and maternity**
- **• Race**
- **• Religion or belief**
- **• Sex**
- **• Sexual orientation**
- **• Other (please specify)**

If you have responded 'yes' about any of the above, please provide further details, explain why and what could be done to change this [Free text box].

GOC response: We are not aware of any aspects of the PSA's proposals that could impact on groups or individuals outlined in the Equality Act 2010.

Rule making guidance

22. Do you think our guidance will help regulators exercise their rulemaking powers effectively? [Free text box]

GOC response: We are supportive of the DHSC's regulatory reform aim, which will enable regulators in future to adapt their rules in a more flexible and agile way to better protect patients and the public. As we stated in our response to question 4, we are supportive of the PSA's role in providing guidance on areas such as rule making, as this may be useful aid for regulators when producing their own guidance. Overall, we support the principles outlined but as rule making guidance, we think the document is light on detail about the rule making process itself.

We think the principles outlined in the document are aimed more at factors to consider when developing policy i.e. effective consultation, taking account of principles of right touch regulation, and consistency between regulators. We agree these are important principles, and ones we already take into account when developing our policies and processes.

The guidance also seems to focus primarily on two factors - consistency between regulators (a principle) and consultation (a process). Whilst the former is a key aim of regulatory reform the other is a statutory requirement in the AAPA Order i.e. regulators must consult as part of developing rules (Schedule 4, section 14 (2)). The guidance does not go into the same level of detail for the other principles highlighted (at 4.2 in the PSA's guidance), with the possible implication that they are less important.

In terms of how the guidance could be improved, we think it would be helpful if there is more clarity in the following areas.

- The purpose and aim of the guidance should be clear and reflected in the content, for example, the rule making guidance could be read as policy development guidance and good practice.
- The guidance needs to be clear on which principles are statutory requirements (under the AAPA Order), and which are guiding principles or areas of good practice.
- The guidance should be more balanced in content, rather than focusing on one or two areas. Annex A is the only table in the

guidance, and this relates to achieving consistency between regulators.

- The guidance lacks detail on the rule making process itself for example, what is a rule and what is its purpose / status alongside primary legislation, and what does good rule-making look like and how do you achieve that.

23. Do you think that the principles outlined are the right ones? [Yes/no/don't know]

GOC response: Yes

24. Do you have any comments to make on the principles listed or any additional principles to suggest? [Free text box]

GOC response: We think that the principles outlined are sensible and reflect factors that we currently take into account when developing our regulatory policies and processes. However, the list (at 4.2) is a mixture of statutory requirements, regulatory reform aims, PSA principles, and other factors. We would question how these principles sit together with the implication being that they are all equal in weight. The first principle ("*Is consistent with the regulator's legislative duties and statutory remit of public protection")*, for example, is a statutory requirement and it is imperative that we are consistent with our legislative framework and our role in protecting the public. The last principle ("*Facilitates multi-disciplinary team working and innovative practice*"), is a factor that could be taken into consideration in some areas of policy development, but it's unclear how this would apply to, for example, rules on fees or revisions and appeals.

25. Do you think that the guidance on consistency between regulators (avoiding unjustifiable difference) is helpful? [Yes/no/don't know]

GOC response: Yes

26. Do you have any comments to make on this section of the guidance? [Free text box]

GOC response: We think that the information in the guidance is useful and agree with the aims of regulatory reform in bringing more consistency between regulators. We think this will be achieved via primary legislation and to a lesser extent in rules. A key aim of regulatory reform is to give regulators greater autonomy to set out the details of their legislative requirements in rules. We should be mindful that while regulatory rules should take consistency into account, it is

also within a regulator's discretion to ensure its rules are reflective of the professions and risks it regulates against. Rules in education and training are an example of where there is significant divergence between regulators which in part reflects the different risk profiles of the regulated professions.

Consistency should also not stifle a regulator's ability to be agile, innovative and open to change, for example, during the COVID-19 pandemic, regulators needed to quickly adapt their fitness to practise approaches so they could continue to manage cases.

We suggest the table in Annex A requires further thought if it is to be a useful tool for regulators as proposed. As it stands, we find the terminology and structure confusing. Are the 'roles' in the vertical column an exhaustive list, as we are unsure how they relate to all areas of rule making (outlined in Schedule 4 of the AAPA Order), for example, how would fees and evidence gathering apply here?

27. **Do you think that the guidance on consultation is helpful? [Yes/no/don't know]**

    GOC response: Yes

28. **Do you have any comments to make on this section of the guidance? [Free text box]**

    GOC response: Overall, we support the points outlined in the section on consultation, and this largely mirrors and is consistent with principles that the GOC already implements as part of its consultation process. However, we think the guidance outlines and highlights good practice in relation to how and when to consult, rather than provides guidance how consultation contributes to an effective rule-making process.

29. **Do you think that the guidance on governance is helpful? [Yes/no/don't know]**

    GOC response: Yes

    Do you have any comments to make on this section of the guidance? [Free text box]

    GOC response: The guidance on governance is helpful, and we agree that regulators should establish appropriate internal governance processes for developing, making and amending rules. We already have these processes in place as part of our internal governance

structure to ensure that the correct procedures are followed i.e. a clear audit trail for when and how decisions are made.

We acknowledge that these processes will need to be reviewed and modified once the Department of Health and Social care have consulted and finalised their policy on the future governance model for health and care regulators. As part of our new strategic plan 2025-30, we will be looking at how our internal governance structures and processes, including rule making powers, will need to change in line with the Department for Health and Social Care's reform programme.

30. **Please set out any impacts that our guidance would be likely to have on you and/or your organisation, or considerations that we should take into account when assessing the impact of the proposals. [Free text box]**

    GOC response: As stated in our response to question 22, we already take into account the principles outlined in the guidance as part of our policy and rule making process. However, we would like further clarification on the status of the guidance in relation to performance reviews as outlined in our response to question 4.

31. **Are there any aspects of these proposals that you feel could result in different treatment of, or impact on, groups or individuals based on the following characteristics as defined under the Equality Act 2010 [Yes/no/don't know]**

- **• Age**
- **• Disability**
- **• Gender reassignment**
- **• Marriage and civil partnership**
- **• Pregnancy and maternity**
- **• Race**
- **• Religion or belief**
- **• Sex**
- **• Sexual orientation**
- **• Other (please specify)**

If you have responded 'yes' about any of the above, please provide further details, explain why and what could be done to change this.

GOC response: We are not aware of any aspects of the PSA's proposals that could impact on groups or individuals outlined in the Equality Act 2010.